COURT OF APPEALS
DECISION
DATED AND RELEASED

July 31, 1996

No. 95-1459

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

In re the Marriage of:

RICHARD D. HERR,

Joint-Petitioner-Respondent,

v.

JANET M. HERR,

Joint-Petitioner-Appellant.

APPEAL from a judgment of the circuit court for Waukesha County: DONALD J. HASSIN, JR., Judge. *Affirmed*.

Before Anderson, P.J., Brown and Nettesheim, JJ.

PER CURIAM. Janet M. Herr appeals from a judgment denying her motion under § 806.07, STATS., to reopen a 1990 divorce judgment on the ground that Richard D. Herr had failed to disclose the value of assets. She argues that she was improperly denied the right to conduct discovery and that relief from the judgment was appropriate. We affirm the judgment.

After twenty-seven years of marriage, Janet and Richard Herr were divorced on June 12, 1990. Property division was made pursuant to the parties' marital settlement agreement. Richard was required to pay Janet $350,000 over ten years and to hold her harmless on all debts and future liabilities. Maintenance was left open in the event that Richard's obligation was discharged in bankruptcy.

On August 12, 1994, Janet filed a motion to reopen the divorce judgment under § 806.07(1)(g) and (h), STATS. She alleged that at the time of the divorce she was under a mental disability which prevented her from understanding and making voluntary decisions in her own best interest during the proceeding. She believed that she was under duress and subject to Richard's manipulation when she executed the marital settlement agreement. She indicated that it was not until the day of the final divorce hearing that she learned that the attorney she believed to be representing both herself and Richard only represented Richard and that she was required to appear pro se at the final hearing. She alleged that she subsequently discovered that the financial disclosure statement prepared by Richard substantially undervalued the extensive business assets held by Richard. Under these circumstances, Janet claimed that the divorce judgment was grossly inequitable such that it should not have prospective application.

With the filing of her motion, Janet served on Richard a subpoena duce tecum for the purpose of taking Richard's videotape deposition. Richard was successful in having the subpoena quashed. The trial court denied Janet's motion to compel discovery. It found that the subpoena served on Richard was overbroad, unreasonably oppressive and harassing. Discovery was stayed until a decision was made on the motion to reopen the divorce judgment. The hearing on the motion to reopen took four days. Janet was permitted to subpoena witnesses and documents for the hearing.

Janet first argues that she should not have been denied discovery. Whether a circuit court erred in denying discovery is a question of whether the court erroneously exercised its discretion. ***First Interstate Bank v. Heritage Bank & Trust***, 166 Wis.2d 948, 952, 480 N.W.2d 555, 557 (Ct. App. 1992). "The appellant has the burden of showing that the trial court abused its discretion, and we will not reverse unless such abuse is clearly shown." ***Van Straten v.***

Milwaukee Journal, 151 Wis.2d 905, 919, 447 N.W.2d 105, 111 (Ct. App. 1989), *cert. denied*, 496 U.S. 929 (1990).

The circuit court made its ruling on two grounds. Janet does not challenge the court's conclusion that the subpoena served on Richard was overbroad, unreasonably oppressive and harassing. We could affirm the court's denial of discovery on that basis alone. *See* ***Franzen v. Children's Hosp.***, 169 Wis.2d 366, 394, 485 N.W.2d 603, 614 (Ct. App. 1992) (concession that discovery request was overbroad supports trial court's decision to deny discovery).

The circuit court also determined that discovery would be inappropriate prior to the actual reopening of the divorce judgment. This was reasonable considering that the divorce action was final and had been for four years before the filing of Janet's motion. The parties had already had the opportunity to litigate components of the divorce judgment. Although Janet complains that Richard was holding "all the cards" because he alone had access to the financial data, until the judgment was reopened the valuation of Richard's assets and income stream was not in issue.

Janet contends that discovery should have followed the circuit court's recognition that she had established a prima facie case permitting the reopening of the judgment. But what Janet ignores is that the court made that determination on allegations that were conclusory. It determined that discovery would have to wait until Janet proved the necessary circumstances for reopening the judgment by way of evidence. It was necessary for the court to determine the truth or falsity of the allegations of "extraordinary circumstances" which might justify reopening the judgment before permitting discovery and litigation of the maintenance and property division issues. *See* ***State ex rel. M.L.B. v. D.G.H.***, 122 Wis.2d 536, 557, 363 N.W.2d 419, 429 (1985). We conclude that the circuit court properly exercised its discretion in denying Janet discovery before the hearing on her § 806.07, STATS., motion.

Before turning to the merits of the § 806.07, STATS., motion, we note that the lack of discovery contributed to the length of the hearing on the motion. Janet was permitted the discovery she sought at the hearing itself. There is no claim that she was surprised by the evidence produced in response to her subpoenas. Moreover, Janet did not seek a continuance of the hearing to

permit her an opportunity to digest the information discovered at the hearing. Even if there was error in denying discovery before the hearing, Janet was not prejudiced.

An order denying a motion for relief under § 806.07, STATS., will not be reversed unless the circuit court erroneously exercised its discretion. ***M.L.B.***, 122 Wis.2d at 541, 363 N.W.2d at 422. We will not find an erroneous exercise of discretion if the record shows that the circuit court exercised its discretion and that there is a reasonable basis for its decision. ***Id.*** at 542, 363 N.W.2d at 422.

Janet sought relief from the judgment under § 806.07(1)(h), STATS., which permits relief for "[a]ny other reasons justifying relief from the operation of the judgment." The "extraordinary circumstances" test applies and the court must determine whether, in view of all the facts, "extraordinary circumstances" exist which justify relief in the interest of justice. ***State ex rel. Cynthia M.S. v. Michael F.C.***, 181 Wis.2d 618, 625-26, 511 N.W.2d 868, 871 (1994).

In exercising its discretion, the circuit court should consider factors

> relevant to the competing interests of finality of judgment and relief from unjust judgments, including the following: whether the judgment was the result of the conscientious, deliberate and well-informed choice of the claimant; whether the claimant received the effective assistance of counsel; whether relief is sought from a judgment in which there has been no judicial consideration of the merits and the interest of deciding the particular case on the merits outweighs the finality of judgments; whether there is a meritorious defense to the claim; and whether there are intervening circumstances making it inequitable to grant relief.

M.L.B., 122 Wis.2d at 552-53, 363 N.W.2d at 427.

The circuit court considered whether the divorce settlement was the result of Janet's conscientious, deliberate and well-informed choice. The court rejected the expert testimony that at the time of the divorce Janet was suffering from depression and therefore incapable of understanding and voluntarily entering into the settlement agreement. Moreover, the court found that Janet had a substantial role in Richard's businesses during the marriage so that she had knowledge of the holdings. It found that she had been assertive and involved in negotiating the terms of the settlement agreement to the point of insisting on protection in the event that Richard discharged his obligation under bankruptcy. The court also considered whether Janet had the effective assistance of counsel. It rejected her testimony that she believed that the divorce attorney retained by Richard was representing both of them and that she was unaware that she was not represented by counsel until only minutes before the final divorce hearing. It found that she had chosen not to have counsel.

The circuit court addressed whether the settlement agreement was grossly unfair. It rejected the theories of Janet's expert accountant that there was substantial, undeclared business value. It determined that the valuations presented by the parties at the time of the divorce was the best evidence in light of the substantial liabilities Richard's businesses were carrying. It found that settlement had relieved Janet of potential liabilities in fair exchange for payments protected from bankruptcy discharge. It concluded that the variation in net worth was not significant enough to warrant reopening the matter.

Finally, the court considered whether there were intervening circumstances making it inequitable to grant relief. It found that, four years later, recalculating Richard's net worth at the time of the divorce would be extremely difficult. It also noted that there had not been any discharge or nonpayment of Richard's obligations under the judgment such that relief was required.

The findings of the circuit court rest on credibility determinations which are strictly for the court to make. We are required to give due regard to the opportunity of the trial court to assess the credibility of the witnesses. Section 805.17(2), STATS. We reject Janet's claim that the court was not free to disbelieve the expert testimony because it was uncontradicted. The weight of the evidence is peculiarly within the province of the trial court acting as the trier

of fact. ***Wiederholt v. Fischer***, 169 Wis.2d 524, 533, 485 N.W.2d 442, 445 (Ct. App. 1992).

Nor are we convinced that the circuit court found Janet incredible simply because of its concern that she had perjured herself at the divorce hearing by testifying there that she had consulted an attorney and did not wish to contest any matters. While the court mentioned Janet's testimony that she had perjured herself at the divorce hearing, it was not a compelling force behind its credibility determination. There were other grounds for the court's disbelief of Janet's testimony.

The record reflects that the circuit court exercised its discretion, considered the appropriate factors and made a reasoned and reasonable decision. We have considered but summarily reject Janet's contention that the circuit court placed too much emphasis on finality rather than on the gross unfairness of the judgment.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.